No. 17-773

In the Supreme Court of the United States

RICHARD A. CULBERTSON,
PETITIONER

v.

NANCY A. BERRYHILL, DEPUTY COMMISSIONER FOR OPERATIONS, SOCIAL SECURITY ADMINISTRATION

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

I. The Court-Appointed Amicus Fails To Address The Text

Amicus[1] knows where she must start—with the text. Amicus Br. 13. Hers, however, is an exceedingly odd "textual" argument. She invokes a broad array of textual principles, like reading the statute in its "entirety," *ibid.*, attending to the language's "context," *ibid.*, and "look[ing] * * * to [the statute's] object and policy," *ibid.*, and enlists various adages of interpretation counseling that "when a Social Security Act provision can be *reasonably interpreted* in favor of one seeking benefits," which this one cannot, "it should be so construed," *id.* at 14 (emphasis added and citation omitted). But she never addresses the only two words that matter: "such representation." 42 U.S.C. § 406(b). Indeed, she mentions these two words only once in her whole brief—in passing, in a footnote, which simply quotes without analysis the much larger provision in which the two key words originally appeared. See Amicus Br. 15 n.9 (quoting original amendment). Whatever else it may be, her primary argument is not textual. It is—at best—a misguided policy argument in textualist drag.

As all those courts below that have addressed the text agree, the statute's meaning turns on the two

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[1] Two amici have filed briefs in the case. To ease exposition, this reply refers to the Court-appointed amicus as amicus and cites her brief as Amicus Br. It refers to the other amicus, the National Organization of Social Security Claimants' Representatives, as NOSSCR and cites its brief as NOSSCR Amicus Br.

words "such representation." "Such" is a term "used to avoid repetition" and it means "of the sort or degree previously indicated." *Webster's Third New International Dictionary* 2283 (1976). The only representation § 406(b) refers to is representation "before the court." 42 U.S.C. § 406(b). Thus, the 25-percent cap on attorney's fees awarded for "such representation" can apply only to fees for representation "before the court." Amicus does not argue that these words can be interpreted any other way. She simply ignores them lest discussion reveal their clarity.

Amicus's primary "textual" argument, making up all but the first two paragraphs of her textualist section, rides a very different beast: legislative history. Amicus Br. 14-19. She makes two moves. First, amicus tries to enlist the enactment history in aid of an argument that § 406(b)'s 25-percent cap applies to work done both before the agency and the courts. She notes, correctly, that before the 1965 amendments, which added § 406(b), the agency had long been authorized to issue rules prescribing maximum attorney's fees for work before the agency. *Id.* at 14. She sees there a "concern * * * that [attorneys sh]ould not overbill their clients," *id.* at 14-15, that she believes Congress "echoed 30 years later" in 1965 when it enacted § 406(b). That may be true, but it says nothing about *how much* Congress was worried and *how much* it sought to balance this concern against other competing ones it expressly mentioned, like making sure attorneys were properly incentivized to take on social security cases. In short, this "concern"

by itself sheds no light on whether § 406(b)'s cap applies to work before both the agency and courts.

Second, amicus argues that in amending § 406(*a*) in 1990 Congress implicitly codified her atextual understanding of § 406(*b*). She claims that "at the time [§ 406(a)] was enacted * * * federal circuit courts of appeals were in unanimous agreement that there was an aggregate 25% cap on attorney's fees * * * [and] Congress presumptively was aware of this." Amicus Br. 18. Four problems immediately appear. For starters, the assent of the Fourth, Fifth, Sixth, and Eleventh Circuits hardly constitutes unanimity, especially when the Sixth Circuit at the government's urging was soon to reverse itself. See *Horenstein* v. *Sec'y of Health & Human Servs.*, 35 F.3d 261, 262 (1994) (en banc). For another, the 1990 conference report itself expressly contemplates that overall attorney's fees could exceed 25 percent of the award. It notes that "if the attorney were *awarded a fee in excess of 25 percent* of the claimant's past-due social security benefits, the amount payable to the attorney out of the past-due social security benefits could not exceed 25 percent of these benefits." H.R. Rep. No. 101-964, at 934 (1990) (Conf. Rep.) (emphasis added).

Her codification argument, moreover, fails on its own terms. The doctrine cannot compel an interpretation that is contrary to the plain language of the statute, see *Demarest* v. *Manspeaker*, 498 U.S. 184, 190 (1991) (noting that "[w]here the law is plain, subsequent reenactment does not constitute an adoption of a previous * * * construction"), and an

aggregate fee cap would contravene § 406(b)'s key words: "such representation."

Even if the text were ambiguous, moreover, which it is not, amicus misunderstands the language she quotes to support congressional adoption: "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it *re-enacts* a statute without change." Amicus Br. 18 (quoting *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) (emphasis added)). That may be true, but Congress did not re-enact *any* portion of § 406 in 1990. Rather, Congress *added* § 406(a)(2), providing for the fee agreement process, see Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 5106(a), 104 Stat. 1388, 1388-266, and left § 406(b) *unchanged*. As this Court has held, when "Congress * * * has made only isolated amendments[, i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the [courts'] statutory interpretation." *Alexander* v. *Sandoval*, 532 U.S. 275, 292 (2001) (citation and internal quotation marks omitted).

II. The Legislative History Underscores What The Text Says: § 406(b)'s Cap Applies Only To Fees Awarded For Work "In Court"

Amicus's second argument betrays her first. She argues next that "one must resort to the legislative history of the statute" because "Congress's silence on the issue presented * * * creates an ambiguity." Amicus Br. 19. But if Congress was silent, how can "[t]he [*t*]*ext*," as she earlier argued, "[s]upport[] a 25%-[a]ggregate [r]ule"? *Id.* at 13 (emphasis added and

bolding omitted). As she herself admits, "[s]ilence * * * normally creates ambiguity. It does not resolve it." *Id.* at 19 (quoting *Barnhart* v. *Walton*, 535 U.S. 212, 218 (2002)). She cannot have it both ways.

Although Congress was not silent when it applied the 25%-cap only to "such representation," the legislative history can still aid interpretation. Properly understood, it "corroborate[s] and fortifies the proper] understanding of the text." *Dig. Realty Tr., Inc.* v. *Somers*, 138 S. Ct. 767, 783 (2018) (Sotomayor, J., concurring).

Amicus treats the two key words in the legislative history, "in court," even more peculiarly than she treats the two key words of the statute. She does not skip over them as if they never appear. See p. 1, *supra*. She instead quotes them repeatedly without realizing that they undercut her argument. See, *e.g.*, Amicus Br. 19-20 (noting HEW concern that "attorneys occasionally charged inordinately large contingency fees for representing claimants *in court*") (emphasis added); *id.* at 20 (noting committee's concern "that attorneys have upon occasion charged what appear to be inordinately large fees for representing claimants *in* Federal District *court* actions") (citing S. Rep. No. 404, Pt. I, 89th Cong., 1st Sess. (1965)) (emphasis added). These words, apparently hiding in plain sight, make clear that Congress intended § 406(b)'s cap to apply only to fees for work "in court," not before the agency.[2]

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[2] Amicus also acknowledges that the 1965 amendment had a second purpose: ensuring effective representation for claimants.

Amicus next argues that "[i]t is difficult, if not impossible, to reconcile" petitioner and respondent's view of the cap with the 1968 amendment, which placed a similar 25-percent cap on fees for work before the agency. Amicus Br. 21. But there is no difficulty, let alone impossibility, here. Since the enactment of § 406(b) in 1965 placed no limit on *total* fees, but only on fees for work "in court," the 1968 amendment was meant to finish the work by applying a cap similar to, but distinct from, § 406(b)'s to all the fees not yet covered: those for work before the agency.

III. Amicus's Policy Arguments In Favor Of An Aggregate Cap Misunderstand The Statute And Practice

1. Amicus claims that petitioner's view would create a "race to the agency" between attorneys looking to collect their fees. Amicus Br. 23-24. But her view misunderstands the consequences of her own position. An aggregate cap would create far greater pressure for attorneys to race.

Section 406 creates two possible races between agency and court attorneys—an authorization race and a payment race. In an authorization race, the court and agency attorneys both race to their respective fora seeking to have each tribunal authorize the fee award before the other. In a payment race,

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Amicus Br. 19. Since the statute necessarily compromises between competing policy goals, "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 526 (1987). See pp. 2-3, *supra* (noting same).

both attorneys rush after authorization to claim (and thus be directly paid) from the 25 percent of past-due benefits withheld by the agency.

Amicus focuses only on the payment race. She notes that without an aggregate cap the total fees authorized could exceed the 25 percent of past-due benefits withheld by the agency. Amicus Br. 23-24 Faced with the undesirable prospect of collecting any fees not paid directly by the agency from their clients, both attorneys would run to be the first to request direct payment from the agency. *Ibid.*

Maybe so. But to the lawyers involved, the consequences of losing the payment race under an aggregate cap are nowhere near as dire as losing the authorization race. Under amicus's aggregate authorization cap, if the attorney who won the authorization race secured a 25-percent fee, the other attorney could not request *authorization*, let alone payment, of any additional fees. And, unlike the loser of amicus's hypothetical payment race, who could at least attempt to collect any unpaid fees from the client, "[c]ollecting or even demanding from the client anything more than the authorized allocation of past-due benefits is a criminal offense." *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 796 (2002) (citing 42 U.S.C. §§ 406(a)(5), (b)(2) (1994 ed.); 20 C.F.R. §§ 404.1740-1799). Thus, the loser of the authorization race would be left with little or nothing at all, which makes representing claimants very risky.

Amicus argues that "there are safeguards to prevent" one attorney from "us[ing] up" the full 25 percent of past-due benefits to the detriment of the

other. Amicus Br. 41. But her purported safeguards are illusory.

First, she claims that "in circuits operating under the 25%-aggregate rule * * * it is standard practice for an attorney who accepts representation of a claimant in court to enter an agreement ahead of time delineating how any withheld benefits will be split between counsel." Amicus Br. 41. But tellingly she cites no evidence—possibly because none exists. On the contrary, most social security attorneys enter into standard agreements calling for fees equal to 25 percent of past-due benefits. See Carolyn A. Kubitschek & Jon C. Dubin, *Social Security Disability Law & Procedure in Federal Court* § 10:13 (2018) (noting that "attorneys routinely enter into contingent-fee agreements for the statutory maximum, specifying that the fee will be 25% of any past-due benefits recovered"); see also *id.* § 10:14 (model fee agreement providing for 25 percent of past-due benefits in fees).

Second, she argues that since both the agency and court require an attorney requesting fees to tell them how much she is requesting from the other forum "there would be no opportunity for [an] attorney to use up the pot of [withheld] past-due benefits." Amicus Br. 42. But of course, even if the agency and courts could adjust the fees they authorize by considering what the attorney requested from the other tribunal,[3] when the

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[3] Amicus NOSSCR objects to what it understands to be part of the Commissioner's argument: "that a court may impose * * * a cumulative cap as a matter of discretion." NOSSCR Amicus Br. 10. Petitioner is less certain that this represents the

first forum authorizes its award the other's actual award is unknown. If different attorneys represented the claimant before the agency and court, which is common, amicus's safeguard vanishes completely. Each attorney would tell the authorizing forum that she was not requesting any fees from the other forum. Thus, both the agency and the court would have no information about what the other might authorize.

2. Attempting to muddy the otherwise clear statutory text, amicus raises another fictive concern: "multiple 'stackable' attorney's fee awards." Amicus Br. 24. She imagines a claimant who wins in both federal district court and the court of appeals. *Id.* at 25-26. She then claims that, under petitioner's view, each court could separately authorize up to 25 percent of past-due benefits in attorney's fees. *Ibid.* Those awards could then be further "stacked" with the 25 percent of past-due benefits the agency can authorize to produce an "absurd" result in which up to 75 percent of past-due

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Commissioner's position, but in any event the issue was neither raised nor addressed below and should not detain the Court here. The proposition—at least in its broadest form—is dubious. Simply reducing a court fee award one dollar for every dollar awarded in fees by the agency would represent an abuse of the court's discretion. *Salinger* v. *Loisel*, 265 U.S. 224, 231 (1924) (holding "sound judicial discretion [must be] guided and controlled by a consideration of whatever has a *rational* bearing on the propriety of the [decision]") (emphasis added). A simple dollar-for-dollar setoff after the aggregate cap was reached would ignore factors, like degree of success, benefit to the claimant, hours worked, the lawyer's ordinary hourly rate, and the difficulty of the case, on which a court should rest its fees decision. See *Gisbrecht*, 535 U.S. at 808 (listing factors).

benefits are consumed by fees. *Id.* at 24-26. But this is pure fantasy.

Amicus cannot identify a single instance in which a federal court has awarded such stackable fees for work in the district court and court of appeals. Not one has. And none of the major treatises on social security law even mentions this possibility. The cases amicus cites are not to the contrary. As amicus's own parentheticals indicate, each stands for the unremarkable proposition that a district court may award attorney's fees under § 406(b) for services performed in both the court of appeals and district court. See *Lavender* v. *Califano*, 683 F.2d 133, 134-135 (6th Cir. 1982); *Brown* v. *Gardner*, 387 F.2d 345, 346 (4th Cir. 1967); *Bailey* v. *Heckler*, 621 F. Supp. 521, 523 (W.D. Pa. 1985).[4] That is entirely consistent with petitioner's view that the *combined* amount of such fees for in-court representation cannot exceed § 406(b)'s 25-percent cap.

Amicus also ignores a provision in the statute that forecloses stackable court fees. When a court renders judgment in favor of a claimant, it may authorize "a reasonable [attorney's] fee * * * not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled *by reason of such judgment*." 42 U.S.C. § 406(b)(1)(A) (emphasis added). In her hypothetical of repeatedly successful judicial appeals,

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[4] Indeed, the *Lavender* court implicitly rejected amicus's view, speaking of a single fee determination and a single 25-percent cap on the fees the attorney could request for all court work. See *Lavender*, 683 F.2d at 135 (holding that "the district court judge is empowered to make *the* fee determination") (emphasis added).

the claimant would be "entitled" to past-due benefits only "by reason" of the last judgment. She could not enforce any demand for payment from the agency before it.

3. Amicus next claims that "[l]ogic supports the 25%-aggregate rule" since "it makes sense to divvy up" the agency and court fees so that attorneys' time spent before the agency and court is appropriately compensated, and "[t]he 25%-aggregate rule does just that." Amicus Br. 26-27 (bolding omitted from first quotation). In fact, it does not.

The aggregate rule cannot divvy up the 25 percent of withheld past-due benefits "appropriately" because § 406 makes no provision for it. How could a court and the agency "appropriately" split up the fees between two attorneys who represented a single claimant at each stage? The court and agency would have to confer, comparing the amount and value of work each attorney did in each forum and authorize fees accordingly. But the statute never contemplates such deep and creative collaboration. See *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 794 (2002) (noting the statute "deals" with the agency and the court "discretely"); 20 C.F.R. §§ 404.1725, 1728, 1730. Nor does it allow an attorney in one forum to petition the other forum to lower fees authorized there. The agency, in fact, just pays court- and agency-authorized fees in the order it receives the requests. See Soc. Sec. Admin., *Program Operations Manual System* GN 03920.050D.4 (Sept. 30, 2011) (*POMS*), https://tinyurl.com/yak75mr8 ("Pay administrative fees and the court fees in the order the component or office responsible for issuing the

payment receives the fee authorizations."). That is what leads attorneys to race both for authorization and payment. Congress would have to overhaul the statute for the agency to "divvy up" the withheld amount in the way amicus suggests.

4. Amicus argues that since "[r]espondent for decades agreed with [the] aggregate rule," that rule is correct. Amicus Br. 27. But both her historical assumption and her conclusion are wrong. The Commissioner first argued that an aggregate cap violates § 406(b) on February 10, 1993. In a brief submitted by Hon. Stuart Gerson, at the time both the Assistant Attorney General for the Civil Division and Acting Attorney General, the Commissioner argued, among other things, that §§ 406(a) and 406(b) "set different statutory maximum allowable fees," Gov't Br. and Suggestion of Initial Hr'g En Banc at 18, *Horenstein* v. *Sec'y of Health & Human Servs.*, 35 F.3d 261 (6th Cir. 1994) (en banc) (Nos. 90-4028 & 92-4302), which led the Sixth Circuit to overturn its previous aggregate cap, *Horenstein*, 35 F.3d at 262. But even if, counterfactually, the agency had hewn to the aggregate cap until recently, that would not validate it. "[N]o deference is due to agency interpretations at odds with the plain language of the statute itself." *Pub. Emps. Ret. Sys. of Ohio* v. *Betts*, 492 U.S. 158, 171 (1989).

5. Amicus also argues that it is unethical for an attorney, like petitioner, to "[o]ppos[e] a 25% aggregate rule" because doing so "creates an irreconcilable conflict between an attorney's personal financial interest and his ethical obligation of zealous advocacy

on behalf of the client." Amicus Br. 30. But this argument proves too much. Taken to its logical conclusion, it would bar an attorney from seeking payment for his fees whenever a client objected—no matter what and how flimsy the ground. In this case, petitioner is seeking only to receive what a proper interpretation of the law allows him. That is hardly unethical.

IV. The Practical Arguments Against An Aggregate Rule Are Compelling

Amicus closes with a hodge-podge of arguments in favor of an aggregate cap. Amicus Br. 31-43. None persuades.

1. In an attempt to wave away concerns about disincentivizing attorneys from representing social security claimants, amicus turns to the "data." Amicus Br. 31. In her reading, it indicates that "the filings of Social Security cases in the district courts within the three circuits that have adopted the 25%-aggregate rule has [*sic*] steadily *increased*." *Id.* at 31-32. This does not pass the sniff test. By themselves, increasing filing rates in aggregate jurisdictions mean little. Rather, how much they have increased and how they compare to filing rates in non-aggregate jurisdictions are the more relevant concerns. More importantly, the "stead[y] increase[]" amicus sees is a statistical artifact of her particular frame of reference. If one looks at filing rates for twelve-month periods ending on June 30 rather than for those ending on December 31, as she does, one sees consistent vacillation. Compare Admin. Office of the U.S. Courts, *Statistical Tables for the Federal Judiciary* tbl. C-3 (2018),

https://tinyurl.com/y73t43ja (reporting end date June 30, 2018), with Admin. Office of the U.S. Courts, *Statistical Tables for the Federal Judiciary* tbl. C-3 (2017), https://tinyurl.com/ybjc5omu (reporting end date June 30, 2017), with Admin. Office of the U.S. Courts, *Statistical Tables for the Federal Judiciary* tbl. C-3 (2016), https://tinyurl.com/yamavkpl (reporting end date June 30, 2016).

2. Amicus then points to four cases in which attorneys "obtain[ed] court fees computed at an hourly rate of over $1,000." Amicus Br. 32. In each of these four cases, however, the district court carefully reviewed the requested fees and found them reasonable. See *Sabourin* v. *Colvin*, No. 3:11-cv-2109, 2014 WL 3949506, at *2 (N.D. Tex. Aug. 12, 2014) ("Considering all [the] factors, the Court finds that the fee award requested * * * would not result in an unearned windfall to [the attorney], but rather constitutes fair compensation."); *Melvin* v. *Colvin*, No. 5:10-CV-160, 2013 WL 3340490, at *3 (E.D.N.C. July 2, 2013) ("[T]he court does not find that the effective reimbursement rate * * * constitutes a windfall [and] the court finds the requested award * * * to be reasonable."); *Vilkas* v. *Comm'r of Soc. Sec.*, No. 2:03CV687FTM-29DNF, 2007 WL 1498115, at *2 (M.D. Fla. May 14, 2007) ("[T]he Court finds that the attorney's fees requested * * * do not violate the statutory cap, are not a product of fraud or overreaching, and are reasonable."); *Claypool* v. *Barnhart*, 294 F. Supp. 2d 829, 834 (S.D.W. Va. 2003) ("[T]he Court finds Plaintiff's requested attorney fee

* * * reasonable in light of all the circumstances in this case.").

3. She next points to one claimant representative, perhaps not even an attorney, who received $38.6 million in fees in one year. Amicus Br. 33. "This level of income" certainly would "provide an adequate financial incentive," *ibid.*, for attorneys to represent claimants, but the report that amicus cites could not be clearer that this number is an abberation. As she herself notes, the vast majority of this income was directly "attributed to [the representative's] firm," *ibid.*, and other parts of it may have been passed through to others as well. Also, the busiest claimant representative that year handled 16,524 claimants. Office of the Inspector Gen., Soc. Sec. Admin., No. A-05-15-15017, *Informational Report: Agency Payments to Claimant Representatives* 9 (2015) (*Informational Report*), https://tinyurl.com/y97wvypq. If one assumes, for purposes of illustration, that the highest paid representative was the one handling the most claimants (and some correlation would be expected), that representative's average awarded fee per claimant would amount to less than $2,500, which is hardly unreasonable.

Even if we focus on outliers, the lack of an aggregate cap cannot explain why a few representatives receive much in fees. Of the ten highest-earning claimant representatives that year, two came from non-aggregate cap jurisdictions (Utah and California) and two came from aggregate-cap jurisdictions (Florida and Texas). *Informational Report* App. C-2. Whatever explains these claimant

representatives' reported high earnings, it cannot be the cap—one way or the other.

As this Court has held, "the generality rather than the exception must form the basis for [a] rule." *Pierce* v. *Underwood*, 487 U.S. 552, 563 (1988). "The median annual direct payment per claimant representative was approximately $20,300" that year and nearly 80 percent of "claimant representatives were paid less than $100,000." *Informational Report* App. C-1. These "generalit[ies]" of compensation raise no concern justifying an aggregate authorization cap.

4. Amicus next argues that the availability of EAJA fees creates an adequate incentive for attorneys. See Amicus Br. 33-34. While not rare, EAJA fees are only awarded in a minority of cases, see *Astrue* v. *Ratliff*, 560 U.S. 586, 601 n.2 (2010) (Sotomayor, J., concurring), and they can increase the attorney's bottom line only when they exceed awarded § 406(b) fees, see Act of Aug. 5, 1985, Pub. L. No. 99-80, § 3(2), 99 Stat. 186 (reproduced as the "Savings Provision" at 28 U.S.C. § 2412 note) (requiring attorney to "refund[] to the claimant the amount of the smaller fee"). Section 406(b) fees, contingent in nature, are calculated to reflect the risk of no compensation—and thus exceed market rate. *E.g.*, *Crawford* v. *Astrue*, 586 F.3d 1142, 1149 (9th Cir. 2009) (en banc); *Wells* v. *Sullivan*, 907 F.2d 367, 370-71 (2d Cir. 1990). The EAJA lodestar rate, by contrast, does not. 28 U.S.C. § 2412(d)(2)(A); *Pierce*, 487 U.S. at 573-574. An EAJA fee will thus exceed a § 406(b) fee only when the attorney's § 406(b) award effectively reflects an hourly rate *well* below the market rate. That is reason to

question the adequacy of § 406(b) awards, not to blindly trust that "[t]he likelihood of obtaining EAJA fees for successful representation, payable over and above § 406 fees and regardless of whether past-due benefits are awarded, provides an attractive inducement to Social Security attorneys." Amicus Br. 34.

EAJA fees are, of course, an important aspect of the statutory scheme. *Ratliff*, 560 U.S. at 600 (Sotomayor, J., concurring). But they rarely change what the attorney takes home at night, and even then not by much. They are also an inadequate safeguard for a more fundamental reason. As this Court has noted, "it is quite impossible to base" an "economically viable contingent-fee practice" on the prospect of EAJA awards because "the lawyer will rarely be able to assess with any degree of certainty the likelihood that the Government's position will be deemed *so* unreasonable as to produce an EAJA award." See *Pierce*, 487 U.S. at 573-574.

5. Amicus recognizes the need to avoid a great anomaly that her reading of the statute creates: an aggregate authorization cap under § 406(b) would effectively render unreasonable fees awarded under § 406(a)(1)'s petition process whenever they exceed 25 percent of past-due benefits, as they can, *Clark* v. *Astrue*, 529 F.3d 1211, 1218 (9th Cir. 2008). To avoid that, she asserts "that the Commissioner has, by regulation, set the maximum fee under § 406(a)(1) when past-due benefits are awarded to the claimant as 25% of those past-due benefits." Amicus Br. 37.

Unfortunately for amicus, the Commissioner does not impose any such cap.

Once again, see pp. 6-7, *supra*, amicus confuses Social Security Administration (SSA) *authorization* and *payment* of fees. Amicus correctly notes that the SSA "may by rule and regulation, prescribe maximum fees" that may be charged for services before the agency. Amicus Br. 35 (quoting 42 U.S.C. § 406(a)(1)). But it has not here. Since § 406(a)(1) requires that charged fees be "reasonable," SSA does not impose any flat percentage cap on the fees it authorizes under the petition process. Rather,

> [w]hen [it] evaluate[s] a representative's request for approval of a fee, [it] consider[s] the purpose of the social security program, which is to provide a measure of economic security for the beneficiaries of the program, together with—
>
> (i) The extent and type of services the representative performed;
>
> (ii) The complexity of the case;
>
> (iii) The level of skill and competence required of the representative in giving the services;
>
> (iv) The amount of time the representative spent on the case;
>
> (v) The results the representative achieved;
>
> (vi) The level of review to which the claim was taken and the level of the review at which the representative became [the beneficiary's] representative; and

> (vii) The amount of fee the representative requests for his or her services, including any amount authorized or requested before, but not including the amount of any expenses he or she incurred.

20 C.F.R. § 404.1725(b)(1). And it allows attorneys to charge only those fees that it "*authorize*[*s.*]" *Id.* §§ 404.1720(b)(2)-(3) (emphasis added).

SSA does, by contrast, limit the amount it may directly "*pay*" attorneys under the petition process to "the smaller of [25] percent of the total of the past-due benefits[] or [t]he amount of the fee that [it] set[s,]" in other words, the amount it *authorizes*. 20 C.F.R. § 404.1730(b)(1) (emphasis added). This limitation, which amicus rests her argument on, see Amicus Br. 37 (discussing 20 C.F.R. § 404.1730(b)), follows directly from the statute, which limits the amount of attorney's fees the SSA shall "certify for *payment out of* * * * *past-due benefits*" to "so much of the maximum fee as does not exceed 25 percent" of the same. 42 U.S.C. § 406(a)(4) (emphasis added). Thus, although the agency has capped *payments* out of withheld benefits at 25 percent, it has not similarly capped the fees it may *authorize* under the petition process. On this point, amicus is simply mistaken.

6. Amicus also argues that an aggregate authorization cap prevents attorneys from "hound[ing]" social security beneficiaries "in perpetuity" for authorized fees that exceed 25 percent of withheld past-due benefits. Amicus Br. 41. She predicts, in particular, that without an aggregate cap lawyers will sue their clients for payment out of

"future disability or SSI benefits, or any other potential sources of income, including inheritances." *Ibid.* But social security's anti-assignment provision expressly protects future benefit payments from "execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." 42 U.S.C. § 407(a); see also 20 C.F.R. § 404.1820(a)(2) (similar). And there is no unfairness in an attorney seeking payment for agreed-upon and authorized fees exceeding the 25 percent of past-due benefits originally withheld if the claimant experiences a windfall, like a large inheritance.[5]

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[5] In a footnote, amicus also suggests that attorneys could seek to recover awarded fees that exceed available withheld past-due benefits through "the SSA's administrative overpayment mechanism, whereby fees would be taken from [the claimant's future] monthly disability payments." Amicus Br. 24 n.18. But this is pure fantasy. What the case amicus cites actually suggests, in dicta, is that if an attorney tries to claim fees *after* the agency has already released the withheld amount to the claimant (because no timely authorization for payment was filed), the agency *might* be able to recover the prior withheld amount through garnishment and then release it to the attorney. See *Hayes* v. *Comm'r of Soc. Sec.*, 895 F.3d 449, 452 (6th Cir. 2018) (describing possible payment mechanisms once the withheld amount has been released to claimant). This dicta does not apply, however, when the agency holds the reserved amount but awarded fees exceed it. In fact, the agency expresly prohibits this practice. See *POMS*, GN 03920.060B.4.b (Oct. 24, 2017), https://tinyurl.com/yd53d2la ("[The SSA] will not use overpayments incurred for months in or after the month a favorable court judgment is issued to offset the amount of past-due benefits it withholds for payment of the attorney's fee."). Even when the agency itself mistakenly fails to withhold a portion of past-due benefits to pay authorized attorney's fees, the agency does not

7. Amicus concedes, as she must, that the agency's own *Program Operations System Manuel* (*POMS*), "the publicly available operating instructions for processing Social Security claims," *Wash. St. Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 385 (2003), acknowledges that aggregate fees under §§ 406(a) and (b) "may exceed 25 percent of past-due benefits," *POMS*, GN 03920.050C (Aug. 24, 2017), https://tinyurl.com/yak75mr8. She tries, however, to undercut the authority of the agency's position by arguing that "the POMS is merely a guidance manual directed at Social Security claim processors intended to instruct them on how to perform their jobs." Amicus Br. 39. While no one contends *POMS* has the full force of law, it does represent more than a shop-floor instruction manual. As this Court has recognized, "[w]hile [*POMS*] interpretations are not products of formal rulemaking, they nevertheless warrant respect in closing the door on any suggestion that the usual rules of statutory construction should get short shrift." *Keffeler*, 537 U.S. at 385. Here the agency's considered and long-held view confirms the text's plain meaning.

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automatically garnish future benefits. See *id.* GN 03920.060B.5 ("If the court orders payment of an attorney's fee from past-due benefits and the processing center or field office did not withhold benefits, the reconsideration reviewer, senior claims processing specialist, disability specialist, or claims representative will contact the Office of the General Counsel for further instructtions.").

Just as "our inquiry beg[a]n[] with the statutory text, [it] ends there as well." *Nat'l Ass'n of Mfrs.* v. *Dep't of Def.*, 138 S. Ct. 617, 631 (2018) (quoting *BedRoc Ltd., LLC* v. *United States*, 541 U.S. 176, 183 (2004) (plurality opinion)). Sections 406(a) and 406(b) "deal[] with" SSA and court proceedings, respectively, and they do so "discretely." *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 794 (2002). Section 406(b) regulates fees for "attorney[s]" who "represented" a claimant "before the *court*" and places a cap on compensation available only for "*such* representation." 42 U.S.C. § 406(b)(1)(A) (emphasis added). "Rather than confront that statutory text, [amicus] asks [this Court] to ignore it altogether." *Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 631. One can understand why she took that strategy. Addressing the text would have foreclosed her position.

CONCLUSION

For the foregoing reasons and those stated in petitioner's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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